This Petition, with the Answers for Thomas Forbes is to be advised, at reporting the Informations for those parties put in the Boxes this day 7 Dec 1765

FEBRUARY 13, 1765.

Unto the Right Honourable the Lords of Council and Session.

THE PETITION OF

Walter, *David*, and *Alexander Cunninghams*, Sons procreated of the Marriage between Captain *Alexander Montgomery-Cunningham* of *Kirktonholm*, and Mrs. *Betty Montgomery*, his Wife, and of the Truſtees, at whoſe Inſtance Execution is ordained to paſs, for Implement of the Contract of Marriage executed between the ſaid Captain *Alexander Montgomery* and Mrs. *Betty Montgomery*,

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Humbly ſheweth,

THAT, by Marriage Articles, of this Date, paſt between Captain *Alexander Cunningham* (therein deſigned, Eldeſt Son to Sir *David Cunningham* of *Corſehill*) and Mrs. *Betty Montgomery*, *Langſhaw*'s Eldeſt Daughter, Captain *Cunningham* became bound and obliged " to provide and ſecure the whole Lands, Superiorities, and other Eſtate, heritable or moveable, then belonging to him, or which he ſhould ſucceed to or acquire during the ſtanding of ſaid Marriage, together with the Lady's Portion of 11000 Merks, to himſelf, and the Heirs-male to be procreated of ſaid Marriage; whom failing, to his Heirs and Aſſignees whatever;" February, 1754.

" whatever;" with and under the Burden of the Liferent Proviſions therein conceived in favours of the Lady, in caſe of her Survivance, and of certain Proviſions to the Daughters of the Marriage, in caſe there ſhould be no Heir-male. And as both Parties thereby obliged them to extend a formal Contract of Marriage, with Procuratory of Reſignation, Precept of Seaſine, and all other Clauſes neceſſary for compleating ſaid Settlement, ſo it was agreed, that Execution for Implement thereof, ſhall paſs at the Inſtance of the Perſons therein named, and amongſt theſe, of *Alexander Boſwell* of *Auchinleck*, Eſq; one of the Senators of the College of Juſtice, the Lady's Uncle, and of *James Montgomery* of *Langſhaw*, Eſq; the Lady's Brother, or any one of them.

The Petitioners, *Walter*, *David*, and *Alexander Cunninghams*, are the three eldeſt Sons of ſaid Marriage, and there are two other Sons lately procreated and exiſting.

The now deceaſed Mrs. *Anne Montgomery* of *Kirktonholm*, Lady *Leckie*, intoxicated with an extravagant Ambition to eſtabliſh a perpetual Repreſentation of the Family of *Kirktonholm*, and to aggrandize the ſame in a very extraordinary Manner, did, of this Date, execute a ſtrict Settlement or Tailzie of ſaid Eſtate, being of yearly Rent about 55 *l. Sterling*, " in favours of herſelf and the Heirs whatſoever of her " Body; whom failing, to Captain *Alexander Cunningham* of " *Corſehill*, her Nephew, eldeſt Son procreated between Sir " *David Cunningham* of *Corſehill* and the deceaſed Mrs. *Pe*" *nelope Montgomery*, her Siſter, and to the Heirs-male of the " Body of the ſaid *Alexander Cunningham*; whom failing, to " *David Cunningham*, ſecond Son of the ſaid Sir *David Cun*" *ningham*, and the Heirs-male of his Body; whom failing, to " *Walter Cunningham*, third Son of ſaid Sir *David Cunningham*, " and to the Heirs-male of his Body; whom failing, to the " Heirs-male deſcending of the Body of *Margaret Montgo*" *mery*, her Siſter, Wife of *Thomas Forbes* of *Waterton*, and " the

Aug. 9, 1756.

" the Heirs-male of the Bodies of theſe *Heirs*-male; whom " failing, to a Series of other Subſtitutes therein mentioned, " with and under the Proviſions, Conditions, Burdens, Re- " ſervations, Reſtrictions, Limitations, Clauſes, irritant and " reſolutive, therein contained."

By theſe Clauſes the whole Heirs of Entail are taken bound and obliged to aſſume and conſtantly retain, uſe and bear the Sirname, Arms, and Deſignation of *Montgomery* of *Kirkton-holm*. 2*dly*, They are prohibited and diſcharged to alter, innovate or change the aforeſaid Tailzie, or Order of Succeſſion. 3*dly*, They are reſtrained from ſelling, wadſetting or impignorating the aforeſaid Lands, or any Part thereof, or to contract Debts thereupon, or grant Infeftments of Annualrent furth of the ſame, or any Right or Security, redeemable or irredeemable, of ſaid Lands, or any Part of the ſame. And there are ſundry other Conditions of the like Nature reſpecting the lying out unentered, neglecting to pay the Feu and Tiend-duties, or other publick Burdens, ſuffering Adjudications to paſs, *&c.* all which Acts or Deeds of Contravention are thereby declared void and null, and the Perſon ſo contraveening, to irritate and forfeit for himſelf only, whereby the Eſtate is to paſs to the next Heir, though deſcended of the Contraveener's Body.

The general Prohibition above mentioned, againſt charging the Eſtate with Debt upon any account whatſoever, is qualified with this Exception, " That it ſhould be lawful to the " Heirs of Tailzie to grant Liferent-infeftments to their La- " dies and Husbands by way of Locality, in lieu of their " Terce and Courteſy, not exceeding a third Part of ſaid " Lands and Eſtate, ſo far as free and unaffected for the Time " with former Liferents and real Debts, and after Deduction " of the Annualrents, or perſonal Debts that may affect the " ſame:—And with this further Exception, that it ſhall be " lawful to the Heirs of Tailzie to provide their younger " Children beſides the Heir, to three Years free Rent of ſaid

" Lands

" Lands and Eſtate, ſo far as the ſame are free and unaffect-
" ed for the Time, with Liferent-annuities and real Debts,
" and after Deduction of the Annualrents and perſonal Debts
" that may affect the ſame."

The Eſtate of *Kirktonholm*, as already ſaid, is about 55 *l. Sterling* of yearly Rent, ſo that, by this Settlement, the Heirs of Entail being bound up not to grant larger Proviſions to their Husbands and Wives than a Third of the free Rent, nor to their younger Children, were they ever ſo numerous, more than three Years free Rent, deducing all former Liferents, real Debts, and even the Annualrents of perſonal Debts, it muſt be apparent how mean and incompetent Proviſions theſe were, which the Heirs of Tailzie were bound not to exceed in favours of their Wives, Husbands, and younger Children, under an expreſs Irritancy and Forfeiture of their Right.

But the moſt extraordinary Part of this Settlement is what follows, reſpecting the Aggrandizement of this Eſtate, by the Accretion of the proper Eſtates of the ſeveral Heirs of Tailzie, as they ſhould happen to ſucceed to the Eſtate of *Kirktonholm*, and which gives Riſe to the preſent Queſtion.

For it is thereby provided, " That if the Right of Succeſ-
" ſion to my Lands and Eſtate above mentioned, ſhall, in
" virtue hereof, and by the Failure of Heirs whatſoever of
" my Body, fall to, and devolve upon the ſaid *Alexander*
" *Cunningham*, or any other of the ſaid Heirs of Tailzie, *hav-*
" *ing Right to the Lands and Eſtate of* Corſehill, *or to any o-*
" *ther Land-eſtate and Inheritance*, then, and in that Caſe, the
" ſaid *Alexander Cunningham*, or any other Heir of Tailzie
" for the Time, having Right to the ſaid Eſtate of *Corſehill*,
" or to any other Land-eſtate, ſhall be holden and obliged,
" within the Space of ſix Months after their Succeſſion to my
" ſaid tailzied Lands and Eſtate, to ſettle and ſecure their
" ſaid Lands and proper Eſtate in favours of the ſame Heirs
" of Tailzie, hereby appointed to ſucceed to my ſaid Lands

" and

" and Eſtate of *Kirktonholm*, under the ſame Proviſion and " Irritancy of carrying the Name and Arms of *Montgomery* " of *Kirktonholm*, *and with and under the other Conditions, Pro-* " *viſions, Reſtrictions, Limitations, Clauſes irritant and reſolu-* " *tive above ſpecified, contained in this preſent Tailzie, declaring,* " *that if the ſaid Alexander Cunningham,* or the Heir of Tailzie " for the Time, in the Right of the ſaid Eſtate of *Corſehill*, " ſhall refuſe or neglect to ſettle and ſecure the ſaid Lands " and Eſtate of *Corſehill*, or any other Land-eſtate then be- " longing to them, in the Way and Manner before preſcrib- " ed, within the ſaid Space of ſix Months after their Suc- " ceſſion to my ſaid tailzied Lands and Eſtate, then, and in " that Caſe, the Perſon ſo contraveening ſhall not only, for " him or herſelf, *but alſo for all the other Heirs of Tailzie above* " *mentioned, deſcended of the ſaid Sir* David Cunningham, *a-* " *mit, loſe, and forfeit their Right and Title to my ſaid tailzied* " *Lands and Eſtate*, which ſhall, from thenceforth, become " *ipſo facto* extinct, void and null, and the ſame ſhall fall, " accreſce and belong to the Heirs-male of the Body of the " ſaid Mrs. *Margaret Montgomery*, Lady *Waterton*, *who ſhall be* " *holden and obliged to ſettle, tailzie and incorporate their proper* " *Lands and Eſtate in the ſame Manner, and with and under the* " *Conditions, Proviſions, Reſtrictions, Limitations, Clauſes irri-* " *tant, and Faculties above ſpecified, contained in this preſent* " *Tailzie.*"

This was certainly the moſt extravagant Conceit and Tailzie-rage, that ever entered into the Mind of any Perſon, that, not ſatisfied with teathering her own Eſtate in this ſtrict Manner, to create a Perpetuity, ſhe ſhould oblige her ſeveral Heirs of Tailzie, to accumulate their proper Eſtates, be they ever ſo great, and to ſubject the ſame to the like Tailzie, in favours of the ſame Heirs, and under the ſame Limitations, *&c.* as in her Tailzie, whereby, upon Failure of the Iſſue-male of their reſpective Bodies, not only her Eſtate, but their Eſtates, ſhould paſs from their natural Heirs, their own

Daughters, and their Deſcendants, to her remote collateral Relations.

But, as this Lady, in her great Foreſight and Providence, ſeems to have foreſeen, that Caſes might exiſt, whereby the Heir of Tailzie, ſucceeding to her Eſtate, might not have it in their Power to comply with this Condition, by reaſon of ſome Condition or Proviſion in the Settlement of their proper Eſtate; and, as ſhe did not intend to puniſh, or forfeit them, for neglecting to do what was not in their Power, ſhe qualified this with the following Clauſe: *Firſt*, With reſpect to Captain *Cuningham*, and his Eſtate of *Corſehill*. *2dly*, With reſpect to the remoter Heirs, "DECLARING nevertheleſs, "That any Entail or Settlement to be made of the ſaid E- "ſtate of *Corſehill*, in the Manner before preſcribed, ſhall be "ſubject always to ſuch Proviſions and Burdens, as are con- "tained in the Contract of Marriage, between the ſaid *Alex- "ander Cuningham* and Mrs. *Montgomery*, his Wife, either "in favours of her, or *the Heirs of the Marriage*, and ſhall "be ſubject likewiſe to the Payment of all the juſt and law- "ful Debts, reſting by the ſaid *Alexander Cuningham*, or by "the Heir in Poſſeſſion of the ſaid Eſtate of *Corſehill* at the "time, with all which the Entail thereof is to be expreſly "burdened, and with and under the like Exception and De- "claration, with reſpect to the other Heirs of Tailzie above "mentioned, on their adjoining and incorporating their pro- "per Eſtates to the ſaid Lands and Eſtate of *Kirktonholm*."

By an After-clauſe in this Settlement, ſhe aſſigns and diſpones to herſelf, and the ſame *Series* of Heirs, all other Lands, Heritages, *&c.* and all heritable and moveable Debts, Sums of Money, Corns, Cattle, *&c.* outſight and inſight Pleniſhing, lying Money, Goods, Gear, *&c.* and other heritable and moveable Means, pertaining to her at her Death, with this Proviſo, that her ſaid Heirs of Tailzie ſhould not only pay all her juſt and lawful Debts, Funeral-charges, and Legacies thereby bequeathed; but that as ſoon after her Death, as conveniently may be, they ſhould convert

convert her ſaid Effects into Money, and ſhould beſtow the free Remainder, after Payment of her Debts, Legacies, *&c.* upon the Purchaſe of Lands, as contiguous to the Eſtate of *Kirktonholm*, as may be had; " and to take the Rights " and Securities of the Lands, ſo to be purchaſed, in the " Form of a ſtrict Entail, to the ſame *Series* of Heirs, and " with and under the ſame Conditions, Proviſions, Bur- " dens, Reſervations, Reſtrictions, Limitations, Clauſes ir- " ritant and Faculties, as are above ſet down, with reſpect " to the Lands of *Kirktonholm*; ſo as the Lands thus to be " purchaſed, and the ſaid Eſtate of *Kirktonholm* may be con- " joined inſeparably in all Time thereafter, *&c.*"

Mrs. *Anne Montgomery* died without Iſſue, poſſeſſed of a conſiderable perſonal Eſtate, and which, when added to the Lands of *Kirktonholm*, will be nearly equal in Value to the Eſtate of *Corſehill*. 7 April, 1761.

The Succeſſion under the Lady's Deed of Settlement having thus devolved upon Captain *Cunningham*, however much he may have diſapproven of the projected Aggrandizement therein contained, by the Accretion of other Eſtates, and of his proper Eſtate in particular; and however doubtful of his own Powers, to impoſe ſuch Entail upon his proper Eſtate of *Corſehill*, by reaſon of the antecedent Obligation he had come under in his own Marriage-contract, in favours of the Heir-male of that Marriage, not chooſing to run the Riſk of a Queſtion of this kind, he, of this Date, which was within the ſix Months of his Aunt's Death, executed a Settlement of his proper Eſtate of *Corſehill*, in exact Conformity to the Lady's Settlement of the Eſtate of *Kirktonholm*, but with an expreſs Proviſo and Declaration, as warranted by the Tailzie, " That the Lands and Eſtate of *Corſehill*, and others thereby " ſettled, ſhould be ſubject always to ſuch Proviſions and " Burdens, as are contained in his own Contract of Marriage, " as well in favours of his Wife, as of the Heirs of the " Marriage." 1 Sept. 1761.

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As by this Tailzie of the Eſtate of *Corſehill*, however involuntary on the Part of Captain *Cunningham*, he appeared to have contradicted the Obligations he had come under by his own Marriage-contract, in favours of the Heir-male of that Marriage, Lord *Auchinleck* and Mr. *Montgomery* of *Langſhaw*, two of the Friends, at whoſe Inſtance Execution was appointed to paſs, brought a Proceſs of Reduction in their own Names, and in Name of the three Infants above mentioned, being the only Sons then exiſting of ſaid Marriage, wherein they called, as Defenders, Captain *Cuningham* himſelf, their Uncle *David* (their other Uncle *Walter* having died without Iſſue), and *Thomas Forbes*, Merchant in *London*, the next Subſtitute in the Tailzie of *Kirktonholm*, whereby they inſiſt, that the Tailzie of the Eſtate of *Corſehill*, executed by Captain *Cuningham*, in compliance with the ſuppoſed Injunctions of the Tailzie of *Kirktonholm*, ſhould be reduced and annulled, as *in fraudem* of Captain *Cunningham*'s Obligation by his own Marriage-contract, to provide and ſecure that Eſtate to the Heir-male of the Marriage, without any Burdens other than the Lady's Liferent-proviſion; and as contrary to the aforeſaid Exception to the Tailzie of *Kirktonholm*, which liberated Captain *Cunningham* from the Obligation formerly impoſed, of ſubjecting his Eſtate of *Corſehill* to the like Tailzie, if contrary to the Obligations and Proviſions he had come under by his own Marriage-contract.

And the Summons concludes to have it found and declared, that the Purſuer, *Walter Cunningham*, as the eldeſt Son of that Marriage, and the other Sons in their Order, have Right, by virtue of the foreſaid Proviſion in their Father and Mother's Marriage-contract, to ſucceed to ſaid Eſtate of *Corſehill*, free from the Fetters of this Entail; that Captain *Cunningham* had no Power to impoſe any ſuch Entail upon them, with prohibitive, irritant, and reſolutive Clauſes; and that this Tailzie ſhall not hurt or invalidate their Right of Succeſſion to the Eſtate of *Kirktonholm*, and other Subjects in the Tailzie

of

of that Eſtate, when the ſame, in the Courſe of Succeſſion thereby eſtabliſhed, ſhall devolve upon them.

Thomas Forbes, the next Branch in the Subſtitution of the Eſtate of *Kirktonholm*, ſiſted himſelf as a Defender in the ſaid Proceſs, and took upon him ſolely the Defence thereof.

The Defences for him pleaded, reſolved in the following Particulars: 1*ſt*, That this was a colluſive Proceſs, carried on by Captain *Cunningham*, in the Name of his Infant-children, to defeat the Settlement which he himſelf had executed of his own proper Eſtate, in compliance with the Obligations he was laid under ſo to do, by his Aunt's Tailzie of the Eſtate of *Kirktonholm*.

2*dly*, That the Obligation which Captain *Cunningham* came under by his own Marriage-contra], in favours of the Heir-male of that Marriage, did not diveſt him of the Fee of that Eſtate, and gave to the Heir of the Marriage only a *ſpes ſucceſſionis*, it was ſtill competent for him to impoſe an Entail upon ſaid Eſtate, which ſhould be binding and obligatory upon the Heir-male of the Marriage, the Statute 1685 making it lawful for all Perſons to entail their Eſtates, under ſuch Conditions as they thought proper.

3*dly*, That a Proviſion of Succeſſion, ſuch as this in a Marriage-contract, conſtitutes the Iſſue of the Marriage Heirs of Proviſion to their Father, which ſubjected them not only to all their Father's onerous, but even rational Deeds; that, as the Eſtate of *Kirktonholm*, with the Addition of the Lady's perſonal Eſtate, was at leaſt equal in Value to the Eſtate of *Corſehill*, it was not only rational in Captain *Cunningham* to accept of the Eſtate of *Kirktonholm*, under this Condition of his making the like Tailzie of his own Eſtate of *Corſehill*, but that it was beneficial to the Heir-male of the Marriage, who, by Means thereof, would become entitled to both Eſtates.

4*thly*, That, ſuppoſing this Condition, as impoſed by the Tailzie of *Kirktonholm*, to be impreſtable by Captain *Cunningham*, by Reaſon of the Obligations in his own Marriage-

contract, that Incapacity muſt operate a Forfeiture, not only of his own Right of Succeſſion to the Eſtate of *Kirktonholm*, and of all his Deſcendents, but alſo of his Brothers and their Iſſue, and all others the Deſcendents of Sir *David Cunningham* of *Corſehill*, becauſe the making ſuch Entail of the Eſtate of *Corſehill*, was an expreſs Condition, the *ſine qua non* of his and their ſucceeding to the Eſtate of *Kirktonholm*, which if he could not perform, he and they muſt forfeit that Eſtate, which, in that Event, would devolve to him, the ſaid *Thomas Forbes*, the next Branch in the Subſtitution of *Kirktonholm*.

5thly, That by the Exception referred to in the Tailzie of *Kirktonholm*, no more was intended, but that the Eſtate of *Corſehill*, when ſo tailzied, ſhould remain ſubject to all the Burdens which Captain *Cunningham* had come under by his Marriage-articles, *viz.* a Liferent-proviſion to the Lady, and Portions to the Daughters, which therefore ought not to be extended to give an Exemption to the Heir of the Marriage from being ſubject to this Entail.

Upon adviſing theſe Defences, with the Anſwers thereto made on the Part of the Purſuers, the Lord *Stoneſield*, Ordi-
Jan. 15th, 1765. nary, was pleaſed, by Interlocutor of this Date, to repel the Reaſons of Reduction, aſſoilzie and decern; to which, upon Repreſentation and Anſwers, he was pleaſed to adhere, by Interlocutor 31ſt *January* 1765.

Of theſe Interlocutors, the Petitioners are humbly to pray your Lordſhips Review, as they cannot but think it is a Queſtion of that Conſequence, as well to merit the Judgment of the whole Court.

And, independent of the extravagant Conceit, apparent upon the Face of the Lady's Entail, to aggrandize her Family-eſtate, by the Accretion of other Eſtates belonging to the Heirs of Entail, and however tolerable this might have appeared, while the Eſtate of *Kirktonholm* remained with the Heirs of the Family of *Corſehill*, that the ſame Heir, ſucceeding

ing to both Eſtates, ſhould be reſtrained from ſelling or burdening either, yet, when by the Failure of Heirs-male of the Family of *Corſehill*, the Eſtate of *Kirktonholm* was to paſs over to the Family of *Waterton*, however rational it might be upon that Emergency, to have brought *Waterton*'s Eſtate under the like Fetters, nothing could be more whimſical, unjuſt, or irrational, than that the Eſtate of *Kirktonholm* ſhould drag alongſt with it to theſe other Families, the Eſtate of *Corſehill*, to the Excluſion of all the Daughters and Heirs-female of that Family. Few Examples have occurred of ſuch an aggrandizing Scheme; nor will it receive Countenance from your Lordſhips, beyond what the Law neceſſarily requires.

The Petitioners Ground of Challenge is founded upon this obvious Principle, that Captain *Cunningham*, by his Marriage-contract, came under a ſpecifick Obligation to ſecure and tranſmit that Eſtate to the Heir-male of the Marriage free of any Burdens but the Lady's contingent Liferent-proviſion, that under that Exception he was bound to give them the Eſtate, *tanquam optimum maximum*, and they were intitled to take it in Fee-ſimple; that however, in the Character of Heir of Proviſion, they might be liable to their Father's onerous, or even rational Deeds, if he had no ſeparate Eſtate out of which theſe could be made effectual; yet, with regard to all voluntary Deeds, the Father had no Power either to impair their *jus crediti*, or to limit the Obligations he had come under by the Marriage-contract, upon the Faith of which, the Lady and her Friends had conſented to the Marriage, truſting to the Settlements therein contained, both in favours of the Lady, and the Children of the Marriage; that the impoſing an Entail ſuch as this, with ſtrict prohibitive Clauſes, reſtraining the Heirs of the Marriage from alienating the Eſtate in whole or in Part, or charging it with one Farthing of Debt, even for the moſt neceſſary Cauſes, other than the ſcanty Proviſions allowed for Wives and Children, and the ſmalleſt Contra-

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vention to import an abſolute Irritancy and Forfeiture, not only of the Contraveener's own Right, but of all his Deſcendants, the very Heirs-male of that Marriage, and as in this Caſe, all the Deſcendants of Sir *David Cunningham* of *Corſehill*, whereby the innocent were made to ſuffer for the Fault of the guilty, was ſo irrational a Deed as no Words could palliate, and ſuch an extraordinary Exertion of Power, as would ſcarce be competent to the moſt unlimited Proprietor, and utterly inconſiſtent with the Obligation which Captain *Cunningham* had come under by his Marriage Articles in favours of the Heir-male of that Marriage.

The Petitioners would not be underſtood thereby to arraign the Part Captain *Cunningham* has acted in this Matter, as ſuppoſing it to be his voluntary Deed; it is manifeſtly the Reſult of Neceſſity not of Choice, to avoid the Forfeiture impoſed by Lady *Kirktonholm*'s Settlement, in caſe he ſhould not do all in his Power to comply with that whimſical Condition. But from whatever Motives it may have proceeded, the Queſtion remains, Whether it was within his Power? If it was not competent for him in his own Right to have impoſed ſuch a Tailzie, it cannot poſſibly be legitimated, becauſe done in compliance with the Orders impoſed in the Settlement of the Eſtate of *Kirktonholm*.

This being the Principle upon which the Petitioners ground their Challenge, they will now proceed to conſider the Relelevancy of the Defences that have been pleaded in the Order above ſtated.

And, with reſpect to the firſt of theſe, which charges this to be a colluſive Proceſs, the Petitioners do not well underſtand what is thereby intended. Captain *Cunningham* was bound to make the Entail: This he has done; but he was laid under no Obligation to juſtify or maintain it when brought under Challenge by third Parties, having an Intereſt to ſet it aſide. He has it not in his Power to hurt or prejudge the Intereſt of his own Children, the Heirs-male under the aforeſaid Mar-

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riage-contract, which provides Execution to paſs at the Inſtance of any of the Friends therein named: It is two of theſe Friends who have brought this Action in their own Names, and in Name of the Children. The Proceſs can never be colluſive when the now Defender has appeared to defend it, and ſo far as it has gone, has prevailed in obtaining from the Lord Ordinary an Abſolvitor. The Word *Colluſion*, therefore, is very improperly applied to this Caſe, and imports no more but that Captain *Cunningham*, after having complied with this Lady's Whim in executing this Entail, leaves it to ſtand or fall by its own Merits, with which the Petitioners have no Concern.

The ſecond Defence maintains the Father's Power, notwithſtanding of the Obligations he has come under in his Marriage-contract to provide and ſecure the Eſtate to the Heirs of the Marriage, to impoſe an Entail of the ſtricteſt Nature upon ſuch Heir, in reſpect that it is but a Proviſion of Succeſſion which is thereby ſecured to the Heir of the Marriage, that the Father remains Fiar, and does not deprive the Children of their Proviſion of Succeſſion, when he tranſmits the Eſtate to them under proper Limitations, to prevent its being diſſipated and ſquandered away, and to ſecure the ſame to the after Line of Heirs; that as the Children muſt take in the Character of Heirs, they are liable to all their Father's onerous and rational Deeds; and that, under the ſpecial Circumſtances of this Caſe, this Entail of the Eſtate of *Corſehill* was not only rational, but beneficial to the Heir of the Marriage.

This is a very general and important Queſtion, which, in a Variety of Caſes, well known to your Lordſhips, has been the Subject of great Litigation, but which the Court have uniformly avoided to determine.

The firſt Inſtance in which that Queſtion ſeems to have occurred, was in the Caſe of *Gordon* againſt *Gordon*, 11th *December* 1731, where the Lords waved determining the general

Point, but took up the Caſe upon the Objections to the Rationality of that particular Entail, which they found to be inconſiſtent with the Proviſions of the Marriage-contract, and therefore reduced the Tailzie; and if the Petitioners are rightly informed, as oft as the Queſtion has ſince occurred, it has always been judged upon the ſpecial Objections, and every ſuch Entail has been uniformly reduced, and if your Lordſhips ſhall think proper in this particular Caſe to follow the ſame Rule, *perinde eſt* to the Petitioners upon what Grounds this Tailzie ſhall be ſet aſide.

But if it ſhall be thought proper or neceſſary to determine the general Point, the Petitioners do with all due Deference maintain, that no Father ſo bound down by his own Marriage-contract, obliging him to provide and ſecure the Eſtate in favours of the Heir of the Marriage, with particular Exceptions, can impoſe any Conditions upon the Heir of the Marriage, were they ever ſo rational, whereby, in reſpect of his Noncompliance with theſe he ſhall forfeit his Right to the Eſtate. An unlimited Fiar may perhaps ſettle his Eſtate as he pleaſes, be the Conditions ever ſo whimſical. But where the Eſtate is already ſettled, and provided by an unalterable Deed, or that the Father is bound ſo to ſettle it, he cannot, by any voluntary Act of his own, impair the Obligation he had come under, or impoſe any Conditions whereby the Heir ſhall forfeit his Right. The impoſing ſuch Entail is one of the ſtrongeſt Acts of the moſt unlimited Fiar, to which the Statute 1685 gives no Protection, when the Perſon who impoſes the Entail has himſelf but a limited Fee.

The ſingle Deciſion, 10th *February* 1724, *Douglas* againſt *Douglas*, which is always reſorted to by the adverſe Party in Queſtions of this Kind, is not of ſufficient Authority, either to alter the Law, or to combat the various other Caſes where a contrary Judgment has been given. It is one of theſe Caſes which is only quoted in Extremity, when better Matterials cannot be found; and as oft as it is quoted, the Petitioners believe

believe it has has been received with Marks of Diſapprobation. The learned Collector of the ſelect Deciſions of that Period, takes notice of it as a circumſtantiate Caſe, and ſeems to point it out, not as a Precedent or Example to be followed, but as one of theſe Caſes where a Court of Juſtice may chance to ſtray.

But, waving the general Point, the Petitioners contend, that this Tailzie of the Eſtate of *Corſehill* is ſo manifeſtly irrational, and ſo much in Defraud of the Obligations in the Marriage-contract, that no limited Proprietor, ſuch as Captain *Cunningham* undoubtedly was, could be intitled to impoſe the ſame.

For, not o mention that the Heirs of Entail are thereby bound up, under an Irritancy and Forfeiture of their Right, to alienate the ſmalleſt Morſel of the Eſtate, even for the moſt neceſſary Cauſes, or to charge it with one Farthing of Debt other than the ſmall Sum allowed for Childrens Proviviſions, can any thing be more abſurd or irrational, than that this Eſtate, which is of ſo much ſuperior Value to the Eſtate of *Kirktonholm*, and the Lady's ſeparate Funds, ſhould be ſo tacked to the Eſtate of *Kirktonholm*, to go alongſt with it as a Pendicle thereof in all future Times, that the Lady's extraneous Heirs ſhould not only be preferred to the Daughters of this Marriage, but that the Heir-male of the Marriage, to whom the Fee was provided ſimple and abſolute, ſhould not have it in his Power to give that Eſtate to his own Daughters ?

To the third Defence, importing, that this was truly beneficial to the Heir of the Marriage, in ſo far as he will take both Eſtates under a ſtrict Tailzie, inſtead of having only the Eſtate of *Corſehill* in Fee-ſimple. The Petitioners for Anſwer ſay, that they are not bound to ſubmit to an Enquiry of this Kind, which, at any Rate, muſt be attended with great Uncertainty. It is believed, the generality of People would prefer a moderate Eſtate of unlimited Property, to an

Eſtate

Eſtate double the Value, but ſo fettered that, excepting the *jus percipiendi fructus*, the Proprietor was, in reality, no better than a Liferenter. They were intitled to take the Eſtate of *Corſehill* free of any Burden, other than their Mother's Liferent; being Fiars of that Eſtate, they could give it to their own Daughters; nor had Captain *Cunningham* any Power to deprive them of that Right, far leſs to tie up their Hands againſt every Act of Property, and to limit them in this irrational Manner, as to the Extent of the Proviſions they might give to Wives or Children.

To the fourth, it is anſwered, That as *nemo præſumitur ludere in teſtamento*; and as it impoſſible to imagine that this Lady, whimſical as ſhe was, in her Settlement, could intend to forfeit her Heirs, the *prædilectæ perſonæ*, for not performing a Condition impracticable *quoad* them, every ſuch Irritancy and Forfeiture, *in pœnam* of the Failzie, carries an implied Condition of its being in the Party's Power to perform the Condition. It would be a ſtrange Abſurdity, to forfeit not only the Party himſelf, but all his Deſcendants, for neglecting to do what he had not in his Power.

But in this Caſe Captain *Cunningham* has done all that was required of him. He has executed the Settlement of the Eſtate of *Corſehill* in the preciſe Terms of the Lady's Settlement of the Eſtate of *Kirktonholm*. This was all that was required of him. He was not bound to warrant that that ſhould be an effectual Tailzie. He gives it ſuch as he has it; further he cannot do, nor was he further bound.

Suppoſing the Eſtate of *Corſehill* ſhould now be totally evicted from him, would that be a juſt Cauſe to forfeit him of his Right to the Eſtate of *Kirktonholm?* It is impoſſible it ſhould, becauſe that is not his Fault. The Caſe in hand is preciſely ſimilar. The Eſtate is ſo far evicted, that he is ſuppoſed not to have it in his Power to make a Tailzie thereof in preciſe Conformity to the Lady's Tailzie of *Kirktonholm*. He has done what he could. He is not to be puniſhed for

what he could not do, far leſs are all his Deſcendants, and all his Father's Family, to irritate their Right to this Eſtate, becauſe Captain *Cunningham* had it not in his Power to tailzie, in this ſtrict Manner, the Eſtate of *Corſehill*, which was formerly bound down, in Fee-ſimple, to the Heirs of the Marriage.

But there is the leſs occaſion to be anxious upon this Article, becauſe, in anſwer to the fifth Defence, it is apparent, that the Lady herſelf had no ſuch Intention, when under the Apprehenſion that Captain *Cunningham*, or *Forbes* of *Waterton*, upon the Succeſſion opening to them reſpectively, might be under ſome legal Diſability to execute ſuch Entail of their proper Eſtates, ſhe expreſly qualifies that Condition to be, but Prejudice to any ſuch previous Obligation.

The Defender attempts ſo to limit this by Conſtruction, as to import no more, but that the Eſtate, though thus ſtrictly tailzied, ſhould remain ſubject to any Burdens which Captain *Cunningham*, by his Marriage-contract, had laid upon it, particularly the Lady's Liferent-annuity.

But the Petitioners oppoſe the Clauſe itſelf, which, in expreſs Words, refers to the Proviſions in ſaid Contract of Marriage, in favours of the Heirs of the Marriage; and the Defender is called upon to point out any Proviſion in that Marriage-contract, in favours of the Heir of the Marriage, other than this ſpecial Proviſion of Succeſſion to a free and unlimited Eſtate.

May it therefore pleaſe your Lordſhips, to review and alter the Lord Ordinary's Interlocutors, and to reduce, decern, and declare in the Petitioners Favours, conform to the Concluſions of their Summons.

According to Juſtice, *&c.*

ALEX. LOCKHART.